

Maurer School of Law: Indiana University  
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 10 | Issue 5

Article 4

2-1935

# Contracts-Liquidated Damages

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Contracts Commons](#)

## Recommended Citation

(1935) "Contracts-Liquidated Damages," *Indiana Law Journal*: Vol. 10: Iss. 5, Article 4.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol10/iss5/4>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## RECENT CASE NOTES

*Contracts—Liquidated Damages.*—Appellant, seller, brings action for damages for breach of contract to buy flour, in accordance with a clause of the contract as follows: "Rights of the Seller: The seller may cancel this contract if there is any unpaid past due bill, or if the property and assets of the buyer are in liquidation. If the buyer shall fail to furnish shipping instructions and/or packages as herein provided, the seller may (1) cancel the contract; or (2) terminate the contract, the buyer to pay to the seller as liquidated damages on wheat flour remaining unshipped by reason of the buyer's breach or default, the sum of" (the contract here provides the method of determining damages). The shipping instructions referred to in the clause of the contract just quoted provide as follows: "Shipments: Title to shipments shall not pass until full payment. Buyer shall furnish seller shipping instructions (and on sales made on a bulk basis, the necessary packages) at least fourteen days before the time of shipment." Appellant's complaint set out the contract and alleged unpaid past due indebtedness of the buyer, and buyer's insolvency and suspension of business, but alleged no failure to furnish shipping instructions or packages as provided in the contract. Held, that appellee's complaint failed to state facts sufficient to constitute a cause of action.<sup>1</sup>

A judgment for damages is the most common judicial remedy for breach of contract and a breach of contract usually creates a right of action for damages.<sup>2</sup> But a breach of contract does not usually create a right of action for liquidated damages. Such a right is not created unless liquidated damages or a means of determining them are provided for in the contract and where the amount so fixed is a reasonable forecast of just compensation,<sup>3</sup> and where the injury caused by the breach is incapable or very difficult of accurate estimation.<sup>4</sup> Damages not liquidated are recoverable under a general allegation, if the injuries are a necessary result, since they are presumed,<sup>5</sup> but in order to recover liquidated damages the contract must be declared on specially and a breach calling for the application of the measure of damages which the pleader invokes must be stated.<sup>6</sup> Therefore, there must exist a right to liquidated damages before they are recoverable and that right depends upon a breach of the duty which by the terms of the contract gives rise to liquidated damages.<sup>7</sup>

For the plaintiff to have recovered in this action it was incumbent upon him to show that there was a violation, on the part of the defendant, of a legal right belonging to the plaintiff which would entitle the plaintiff to recover liquidated damages. The plaintiff may have suffered actual damage but if he claims the violation of no legal right he cannot recover.<sup>8</sup> That a payment of liquidated damages may not be required unless it is shown that

<sup>1</sup> Plant Flour Mills Co. v. Banner Baking Co. (1934), 192 N. E. 318.

<sup>2</sup> American Law Institute's Restatement of Contracts, sec. 327; Brown v. Langner (1900), 25 Ind. App. 538, 58 N. E. 743; Johnson v. Heaton (1902), 28 Ind. App. 475, 61 N. E. 959.

<sup>3</sup> American Law Institute's Restatement of Contracts, sec. 339; Merico v. Burget (1905), 36 Ind. App. 453, 75 N. E. 1083; J. I. Case Threshing Machine Co. v. Fronk (1908), 105 Minn. 39, 117 N. W. 229.

<sup>4</sup> American Law Institute's Restatement of Contracts, sec. 339; Benner v. Magee (1904), 34 Ind. App. 176, 70 N. E. 823; Garst v. Harris (1900), 177 Mass. 72, 58 N. E. 174.

<sup>5</sup> Hadley v. Prather (1878), 64 Ind. 137; Finley v. Atlantic Transport Co. (1916), 220 N. Y. 249, 115 N. E. 715.

<sup>6</sup> Rainier v. Masters (1916) 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197.

<sup>7</sup> Godchaux v. Hyde (1910), 126 La. 187, 52 So. 269.

<sup>8</sup> Forster v. Flack (1909), 140 Wis. 48, 121 N. W. 890.

they are reserved for the breach of a specified contract duty is illustrated by the case of *Curnan v. Delaware and O. R. Co.*,<sup>9</sup> in which in a contract for the construction of a railroad the right was reserved to the company to terminate the contract at any time by formal notice in writing and upon the payment to the contractor for all labor performed and the further sum of three thousand dollars as liquidated damages. The court held that the provision for liquidated damages was only applicable in case the contract was terminated as above stated and not applicable when the contract was otherwise breached by the company.

In the instant case the seller brought the action on the contract but failed to allege any breach of duty on the part of the buyer which would entitle the seller to recover the liquidated damages as provided for in the contract. Under the "Rights of the Seller" as previously stated in the facts, the first provision gives to the seller a privilege of cancelling the contract upon the condition of any unpaid past due bill or liquidation of the buyer's assets. There is no mention of liquidated damages but it is under this provision that the seller attempted to show a right to such damages. The next provision, which is the next sentence, gives the seller a twofold right upon the condition of failure to provide shipping instructions and/or packages. The first of these provisions is to cancel the contract and the second is to terminate it and it is here with the right of termination that we find the only provision for liquidated damages in the entire contract. Both of these latter rights are separately stated and numbered which clearly shows that the contracting parties intended the right of cancellation to carry a different meaning from the right of termination. As the first right is to cancel the contract and the second is to terminate it and collect liquidated damages, the obvious conclusion is that if the seller chooses to cancel the contract he cannot collect liquidated damages. In the first sentence under the "Rights of the Seller" is also found the term "Cancel" but here the argument for allowing liquidated damages is even less convincing than the argument where the term is later used and there it is not convincing at all. The right to liquidated damages is connected with the word "Terminate" and not with the word "Cancel" and is limited to the reasons specified in the contract and only upon a breach of or a default of a specified duty of the buyer. Liquidated damages are only recoverable according to the terms of this contract, as interpreted in the light of the existing law, when the buyer has defaulted in his duty by failing to provide shipping instructions and/or packages as the case may be. The seller's complaint alleged unpaid past due indebtedness of the buyer and the buyer's insolvency and suspension of business. This allegation only gives the seller the privilege of cancelling the contract. The seller does not claim that the buyer has breached his duty to provide shipping instructions and/or furnish packages, and since the right to liquidated damages is dependent upon such a breach of duty, the seller has stated no cause of action for liquidated damages.

The cases precisely in point are practically non-existent but a few have decided the same point of law involved in this case altho under different sets of facts.<sup>10</sup> The final result devolves back on the original proposition, that there can be no legal remedial right unless there has been a breach or default of the duty which gives rise to that particular right.

J. O. M.

<sup>9</sup> *Curnan v. Delaware & O. R. Co.* (1893), 138 N. Y. 480, 34 N. E. 201.

<sup>10</sup> *Rainier v. Masters* (1916), 79 Ore. 534, 154 Pac. 426, 155 Pac. 1197; *Weiss v. United States Fidelity and Guaranty Co.* (1921), 300 Ill. 11, 132 N. E. 749; *Moses v. Autuono* (1908), 56 Fla. 499, 47 So. 925; *Oakland Electric Co. v. Union Gas & Electric Co.* (1910), 107 Me. 279, 78 Atl. 288; *Murphy v. United States Fidelity and Guaranty Co.* (1905), 100 App. Div. 93, 91 N. Y. Supp. 582.